

STATE OF MICHIGAN
COURT OF APPEALS

PRISCILLA BAINE,

Plaintiff-Appellee,

v

CITY OF INKSTER,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 274261

Wayne Circuit Court

LC No. 05-512085-NO

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The trial court erred in denying defendant's motion for summary disposition because the undisputed evidence shows that the discontinuity defect (a height differential between two adjacent flags of concrete) was less than two inches and plaintiff failed to rebut the inference under MCL 691.1402a(2) that the sidewalk was maintained in reasonable repair.

MCL 691.1402a(2) states:

A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

The photographs that were attached to defendant's reply brief, combined with the affidavit of Reiven Holt, show that the discontinuity defect was less than two inches. The photograph on which plaintiff relies, which was attached to defendant's original motion, does not provide a contradictory measurement. The photograph depicts a ruler next to the defect. The lines that appear on the ruler are actually visible on the entire photograph, as though it were printed on lined paper. The lines show most clearly on the ruler, but they are discernible on the sidewalk as well. The lines do not correspond to the numbers on the ruler; the spacing of the

numbers is greater than the spacing of the lines. The lines that appear throughout the photograph, including on the ruler, do not provide any indication of the height differential. Thus, this evidence is insufficient to create an issue of fact to counter the evidence presented with defendant's reply brief.

Plaintiff claims that the inference of reasonable repair was rebutted because of the state of disrepair of the flag overall. However, the other defects did not cause plaintiff's fall. If the inference of reasonable repair created by MCL 691.1402a(2) is to have meaning, then a plaintiff relying on a discontinuity defect of less than two inches needs to establish some aspect of the defect that distinguishes it from the typical cases to which the inference was intended to apply. In this case, the hazard posed by the raised flag was apparent and could have been avoided by pedestrians. Plaintiff failed to present any evidence to rebut the inference of reasonable repair.

In light of our decision, it is unnecessary to address whether plaintiff failed to establish that defendant had notice of the defect.

Reversed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Stephen L. Borrello